

Nos. 04-1034, 04-1384

In the
Supreme Court of the United States

JOHN A. RAPANOS *et ex, et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JUNE CARABELL, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**BRIEF FOR THE NATIONAL FEDERATION OF
INDEPENDENT BUSINESS LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

KAREN R. HARNED
ELIZABETH GAUDIO
NFIB LEGAL FOUNDATION
1201 F Street, NW
Washington, DC 20004
(202) 554-9000

ROBERT R. GASAWAY
Counsel of Record
ASHLEY C. PARRISH
ERIN E. MORROW
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for the Amicus Curiae

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers' regulations promulgated pursuant to the Clean Water Act lawfully and constitutionally vest the Army Corps with broad, land-use decisionmaking authority over essentially any and every wetland in the United States.

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INTEREST OF *AMICUS CURIAE*¹

The National Federation of Independent Business Legal Foundation (“NFIB Legal Foundation”), a nonprofit, public interest law firm established to protect the rights of America’s small-business owners, is the legal arm of the National Federation of Independent Business (“NFIB”). NFIB is the nation’s oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 States. The 600,000 NFIB members own a wide variety of small businesses, including restaurants, family farms, neighborhood retailers, service companies, and technology manufacturers. NFIB represents small employers who make up an important segment of the business community. Members typically have about five employees and report gross sales of \$350,000; the average member nets \$40,000 to \$50,000 annually. These small businesses face challenges and opportunities that distinguish them from publicly traded corporations.

NFIB members have an important interest in these cases because small businesses continue to bear a disproportionate share of the federal regulatory burden associated with environmental regulations. A September 2005 study commissioned by the Small Business Administration reveals that environmental and tax compliance regulations are the main cost drivers in determining the severity of the disproportionate impact on small firms. Compliance with environmental regulations alone costs small firms 364 percent more than large firms.

¹ Both petitioners and respondents have consented to the filing of this brief in letters that are on file in the Clerk’s office. Pursuant to S. Ct. R. 37.6, *amicus curiae* state that no counsel for a party authored any part of this brief, and no person or entity other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The five years following *Brown v. Board of Education*, 349 U.S. 294 (1955), are often termed years of “massive resistance” to that decision’s holding. In similar fashion, the five years following this Court’s 2001 decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”), might be termed years of “passive resistance”—both to *SWANCC*’s holding itself and to any serious attempt to reconcile state with federal authority as regards wetlands protection and water-quality preservation. The Army Corps of Engineers (“Army Corps” or “Corps”) initially considered making a good-faith attempt to reconcile its wetlands regulations with *SWANCC*’s statutory and constitutional teachings. See *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,”* 68 Fed. Reg. 1991 (Jan. 15, 2003). But in the end the Corps retreated from that objective; hunkered down with a modest redeployment of what was left of its pre-*SWANCC* legal position; and failed to make meaningful changes to its regulatory program. With the notable exception of the Fifth Circuit, the lower federal courts have acquiesced, consistently upholding applications of Army Corps regulations that *SWANCC* rendered unlawful.

These consolidated cases present a tailor-made opportunity for the Court to vindicate the authoritative status of *SWANCC* in particular and the binding nature of this Court’s decisions more generally. In two separate but equally misguided rulings below, the Sixth Circuit failed to acknowledge that the fundamental assumptions underlying the Corps’ regulations—not merely the regulatory provision aimed at migratory birds—were undermined by *SWANCC*. More specifically, the Sixth Circuit overlooked or ignored that *SWANCC* forecloses giving deference to the Corps’ administrative interpretations and that the motive force

driving *SWANCC*'s result was this Court's constitutionally essential solicitude for preserving the States' prerogatives over land-use decisionmaking.

SWANCC drew a landmark jurisprudential line reconciling federal interests in the navigability and quality of "waters of the United States" with the States' concededly *exclusive* authority to make land-use decisions for wetlands, dry land, and other property outside the federal ambit. Noting the important federalism aspects of such a reconciliation, *SWANCC*'s reading of the Clean Water Act, while not comprehensive, established at a minimum that the Corps lacked land-use authority over "ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168 (emphasis in original). The regrettable "passive resistance" to *SWANCC* has undoubtedly been caused in part by governmental chaffing at the bridle of law. But that resistance has also been partly caused by genuine confusion over what suffices to confer Clean Water Act jurisdiction. This submission, in addition to underscoring the practical importance of these cases to small businesses, seeks to dispel this confusion by defining and distinguishing the two types of constitutional and statutory authority the Army Corps exercises—a distinction that thus far has largely eluded the lower courts.

Courts have typically wandered astray by failing to appreciate that the Clean Water Act provision at issue here, section 404(a), governs "the *discharge* of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); (emphasis added). As *SWANCC* indicated, "*discharges* of dredged or fill material" can logically come in only two relevant varieties—(i) discharges directly involving highways of water-borne commerce, such as the Mississippi River System or St. Lawrence Seaway; and (ii) discharges involving, not great aquatic highways, but other "waters of the United States" used in interstate commerce. See 33 U.S.C. § 1362(7). This distinction,

critical for both constitutional and statutory analysis, is one between, on the one hand, the asserted federal authority to engage in *land-use decisionmaking* for parcels bordering major commercial waterways and, on the other hand, the very different authority to enforce *water-quality preservation* or *water-pollution prevention* rules.

As explained in detail below, the Sixth Circuit confused these separate headings of federal authority and, as a result, lapsed into error. Most importantly, the Sixth Circuit mistakenly approved the Corps' assertion of authority to apply land-use decisionmaking regulations to the *Rapanos* and *Carabell* parcels—lands not “actually abutting” commercial waterways. By subjecting non-abutting wetlands to federal land-use regulations that can lawfully apply, if at all, only to parcels bordering the Nation's great commercial waterways, the Sixth Circuit departed from *SWANCC*, misapplied the Act, and permitted the Corps to exceed its authority under the Constitution.

ARGUMENT

I. THE SIXTH CIRCUIT'S EXPANSIVE READING OF THE CLEAN WATER ACT RENDERS THE ACT UNCONSTITUTIONAL.

These cases do not challenge the power of the Army Corps to regulate land use along the borders of major federal waterways. Nor do they challenge the power of federal agencies to regulate activities causing pollution of the Nation's water resources. What they most assuredly do challenge is the Corps' bid to arrogate authority over land-use decisionmaking for any and every wetland in the Nation. Even putting to one side the Clean Water Act, the Constitution forbids any such exercise of federal authority.

A. The Corps' Regulations Seek To Impose Nationwide Land-Use Requirements On A Vast Array Of Privately Owned Wetlands.

The Corps' regulations define the "waters of the United States" subject to the Corps' wetlands permitting requirements in the most expansive way conceivable. Specifically, the regulatory definition encompasses "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). Of the many items on this lengthy listing, "wetlands" is the only one carrying a separate regulatory definition. The Corps' regulations provide: "[t]he term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency or duration to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* § 328.3(b). The Corps further extends this already liberal definition to cover "[w]etlands adjacent to waters (other than waters that are themselves wetlands)." *Id.* § 328.3(a)(7). And section 328.3(c) of the Corps' regulations goes further still: defining "adjacent" as "bordering, contiguous, or neighboring," and then adding a proviso stipulating that even "[w]etlands *separated from* other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* § 328.3(c) (emphasis added).

Having asserted jurisdiction over any plot wet enough "to support a prevalence of vegetation typically adapted for life in saturated soil conditions," the Corps and the United States Environmental Protection Agency ("EPA") proceed to make permitting decisions turn essentially on land-use considerations, such as whether aesthetic and ecological considerations warrant keeping these damp plots in a

perpetual condition of dampness. *See, e.g.*, 40 C.F.R. § 230.10 (prohibiting the discharge of pollutants that have significantly adverse effects on, among other things, “aesthetic” values). EPA regulations thus require that the Corps consider “the characteristics of the substrate at the proposed disposal site,” as well as the “possible loss of environmental characteristics and values,” including whether the discharge might affect “the complex physical, chemical, and biological characteristics of the substrate” or affect “bottom-dwelling organisms.” *Id.* § 230.20(b). The regulations provide in particular that discharges may not adversely affect wildlife, *see id.* § 230.10(c)(1), including “loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem.” *Id.* § 230.32(b).

In practice, the Corps has interpreted and applied its regulations broadly to exercise control over whether to allow or prohibit the dredging or filling of any and every wetland in the Nation. The Corps has consistently employed its nationwide regulations to prevent private landowners from making any improvements to wetland parcels, and has used its permitting authority to prevent and control development. In sum, the Corps’ regulations applied in this case seek to achieve land-use goals, weigh land-use values, and drive land-use decisionmaking.

B. Under Our System Of Government, Land-Use Planning Is The “Quintessential” Function Of The States.

In stark contrast to the Corps’ federal program of nationwide land-use regulation, this Court has often remarked that “[t]he regulation of land use is traditionally a function performed by local governments.” *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 402 (1979); *see also Hess v. Port Auth. Trans-Hudson Corp.*,

513 U.S. 30, 44 (1994) (same); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (recognizing “the authority of state and local governments to engage in land use planning”); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Indeed, the Court has gone so far as to declare that “regulation of land use is perhaps the *quintessential* state activity.” *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added). The Court accordingly has deemed land-use controls through zoning as “peculiarly within the province of state and local legislative authorities.” *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). In a passage now commonplace in the Court’s decisions, Justice Jackson emphasized that the Constitution’s allocations of “differentiated governmental power” need not undermine the integration of these “dispersed powers into a workable government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion). And so experience teaches with respect to the Constitution’s reservation of land-use decisionmaking authority as a province of state and local governments.

States historically have taken leading roles in translating environmental science into effective conservation programs. Most relevant here, States have enacted extensive wetlands protection regimes, ranging from traditional permitting systems to incentive programs, “critical area” designations, and buffer zone requirements. This regulatory diversity reflects not only individual state preferences, but also “the [biological] diversity of freshwater wetland types across the nation.” Jonathan H. Adler, *Wetlands, Waterfowl and The Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 49-50 (1999) (internal citation omitted) (noting that “many state supplemental programs deliberately exceed stringent federal wetlands regulations”). State efforts in the wetlands protection arena are further supplemented by wetlands protection measures enacted by thousands of local

governments. *See id.* at 48-52 (summarizing the history of state wetland regulation); *see also* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005). State and local wetlands programs thus exemplify Justice Brandeis's observation that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Nearly a decade before the Clean Water Act, Massachusetts embarked on the first statewide wetlands protection experiment. In 1963, Massachusetts enacted a pioneering program requiring state-issued permits as a precondition to filling or dredging of coastal wetlands. *See* Mass. Gen. Laws ch. 130, § 27A, 1963 Mass. Acts 426, repealed by 1972 Mass. Acts 784, § 2, superceded by Mass. Gen. Laws ch. 131, § 40 (1991). Massachusetts extended these protections to inland wetlands two years later—a full decade before the Corps began regulating wetlands. *See NRDC, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (directing that wetlands be regulated under section 404). Although the Massachusetts law was the first state-level statute, it was far from the first local government initiative to protect wetlands. Rather, the Massachusetts law itself was “based on a number of local zoning permit requirements already to be found in coastal states.” Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands in Wetland Protection: Strengthening the Role of the States* 255 (Ass'n of State Wetland Managers, 1985).

Nor did Massachusetts act alone. Other States, including Connecticut, Georgia, and Washington, all took active wetlands protection measures in the 1960s. In fact, by the time federal wetlands regulations were promulgated in 1975,

every coastal State but one had adopted coastal wetlands protections, and eleven States had passed statutes to protect freshwater wetlands as well. See Jon A. Kusler *et al.*, *State Wetland Regulation: Status of Programs and Emerging Trends* 1 (Ass'n of State Wetland Managers, 1994); see also Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 578-79 (2001) (discussing substantial environmental progress achieved by the States prior to 1970).

These fruitful, longstanding wetlands protections are now threatened by the Clean Water Act's growing displacement of state and local land-use law. As of 2000, the Corps was approving approximately 85,000 permits each year for the use or modification of designated wetlands. See Release No. PA-00-05, *U.S. Army Corps of Engineers Announces Replacement Nationwide Permits*, available at <http://www.hq.usace.army.mil/cepa/releases/nationwidepermits.htm>. (visited on December 1, 2005). Notwithstanding these thousands of approvals, the Corps regularly brings enforcement actions against landowners, large and small, for actions such as building vacation homes. See *Regulatory Warning: Hearings Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Robert McMackin) (describing the Corps' determination that construction of a vacation home on a third of an acre lot violated federal wetlands regulations).

After *SWANCC*'s announcement of limits on federal regulatory authority, the States stood poised, not to abandon their wetlands to out-of-control development, but to repatriate wetlands protections back to the levels of government closest to the citizenry. At least 19 states responded to *SWANCC* "by either enacting or recommending the enactment of laws" designed to protect wetlands that might no longer be subject to federal jurisdiction. Michael J. Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31

ENVTL. L. REP. 11079, 11085 (2001); *see also* Caleb A. Jaffe, *Tragedy of the Wetlands Commons: What the Virginia Nontidal Wetlands Resources Act Says About The Future Of Environmental Regulation*, 20 VA. ENVTL L.J. 329 (2001). That is, as this Court “restricted federal regulatory jurisdiction over wetlands,” the States began to take up the slack by expanding their own “wetland protection.” Jonathan H. Adler, *Letting Fifty Flowers Bloom: Transforming The States Into Laboratories Of Environmental Policy*, available at <http://www.federalismproject.org/masterpages/environment/flowers.pdf> (visited on December 1, 2005). To be sure, the Corps’ passive resistance to *SWANCC*—and the resulting ambiguity as to the ultimate contours of federal wetlands protections—may have “discourage[d] states from filling the gaps.” Jonathan H. Adler, *The Fable of Federal Environmental Regulation: Reconsidering The Federal Role In Environmental Protection*, 55 CASE W. RES. L. REV. 93, 112 (2004). But this hesitancy is unsurprising given the uncertainties as to “how much of a gap” ultimately would be left to fill. *Id.* Precisely because “state governments are not likely to squander scarce resources duplicating federal regulations,” the Corps’ passive resistance and the resulting “lack of clear boundaries on federal regulation” have likely resulted in “lower levels of environmental protection.” *Id.* at 112-13.

C. The Corps’ Regulations Violate Constitutional Federalism Principles.

In light of States’ wetlands-preservation authority, experience, and track record of success, the *de facto* displacement of state and local land-use decisions represented by the Corps’ nationwide, 85,000-permit-strong, land-use program constitutes an unwise, as well as unconstitutional, departure from our structure of government. This Court recognized in *Gregory v. Ashcroft* that the “federalist structure of joint sovereigns preserves to the people numerous advantages.” 501 U.S. 452, 458 (1991).

Accordingly, the federal government, “anxious though it may be to vindicate and protect federal rights and federal interests,” *Younger v. Harris*, 401 U.S. 37, 44 (1971), needs ever to recall that it exists as a government of defined and enumerated powers. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.); *The Federalist* No. 45 (James Madison).

This Court recognized in *United States v. Lopez*, 514 U.S. 549 (1995), and in *United States v. Morrison*, 529 U.S. 598 (2000), and, most recently, in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), that the scope of congressional power under the Commerce Clause, while broad, is necessarily limited by the fact that the federal government is one of enumerated powers. The Commerce Clause authorizes Congress to regulate only (i) the “channels of interstate commerce;” (ii) the “instrumentalities of interstate commerce or persons and things in interstate commerce;” and (iii) “those activities having a substantial relation to interstate commerce.” *Lopez*, 514 U.S. at 558-59. As applied to the *Carabell* and *Rapanos* parcels, however, the Corps’ regulations simply cannot be squared with these minimum constitutional requirements. To be sure, wetlands bordering commercial waterways might conceivably be deemed subject to federal jurisdiction as part and parcel of those waterways—that is, as part and parcel of “instrumentalities of interstate commerce.” *Id.* at 558 (stating that “instrumentalities” category includes statutory provisions applicable to “aircraft” and “vehicles used in interstate commerce”) (citations omitted). But neither the *Carabell* parcel nor the *Rapanos* parcel borders a commercial waterway. As applied here, the Corps’ regulations may be upheld, if at all, only as regulations of “activities that substantially affect interstate commerce.”

Lopez and *Morrison* establish that regulatory programs are constitutional on “affecting commerce” grounds only where the regulatory regime focuses on economic endeavors, *Lopez*, 514 U.S. at 560; includes an “express jurisdictional

element” limiting its reach to commercial activities, *id.*; or contains detailed legislative or statutory findings describing effects on commerce that otherwise might not be “visible to the naked eye.” *Id.* at 562. As further described below, however, the regulation of commercial enterprise—voluntary exchanges of goods or services for value—is not the focus of the Corps’ regulatory program; instead, the program functions as a sort of national zoning board governing land uses for virtually every damp plot of ground. Moreover, neither the Clean Water Act nor the Corps’ regulations contain an express jurisdictional element limiting the Act’s reach to proposed “discharges” having “a substantial effect on interstate commerce.” *Id.* at 560. Finally, neither the Act nor its legislative history contains “express congressional findings regarding” the commercial effects of transferring land-use decisionmaking by state and local governments to the Army Corps in Washington. *Cf. Morrison*, 529 U.S. at 612. As this Court noted in *SWANCC*, the Act’s legislative history gives no indication that Congress intended to exercise authority over wetlands not bordering commercial waterways, much less that Congress desecrated otherwise hidden economic benefits to a centralized, nationwide, 85,000-permit-strong, land-use program. *See SWANCC*, 531 U.S. at 168 n.3.

The Corps’ statutory interpretation is additionally infirm because it sweeps broadly into areas of traditional state authority. *See Morrison*, 529 U.S. at 613. Instead of recognizing “any limitation on federal power” in the area of local land-use regulation, *Lopez*, 514 U.S. at 564, the Corps purports to regulate even the most basic acts by landowners, including “the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee.” *Final Notice of Modification of Nationwide Permit 29 For Single Family Homes*, 64 Fed. Reg. 47,175, 47,178 (Aug. 30, 1999) (providing final notice of modification of permits

involving single family housing). In fact, the Corps asserts jurisdiction over even trivial activities: “[w]alking, bicycling or driving a vehicle” through a wetland all might fall within the Corps’ jurisdiction because all of these activities could result in “discharge of dredged material.” *Clean Water Act Regulatory Programs*, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). Under existing regulations, the Corps has even required permits for residential construction impacting closet-sized (26 square feet) and recreation-room-sized (400 square feet) parcels of wetlands. See Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* ix (1994).

If this Court were “to adopt the Government’s expansive interpretation,” then “hardly a [parcel of] land would fall outside the federal statute’s domain.” *Jones v. United States*, 529 U.S. 848, 857 (2000). The Court accordingly should decline the Corps’ invitation—accepted by the Sixth Circuit—to “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Lopez*, 514 U.S. at 567. “Congress may regulate non-economic interstate activities *only* where the failure to do so ‘could ... undercut’ its regulation of interstate commerce.” *Gonzales*, 125 S. Ct. at 2218 (J. Scalia, concurring) (citing *Lopez*, 514 U.S. at 561) (emphasis added). Here, however, the Corps’ program of land-use regulation has nothing to do with “commerce” or any sort of “economic enterprise,” however broadly one might define those terms. *Lopez*, 514 U.S. at 561. Nor is the Corps’ regulatory regime an essential part of “a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Gonzales*, 125 S. Ct. at 2210 (quoting *Lopez*, 514 U.S. at 561).

In sum, the Army Corps’ permitting program needlessly injects federal regulatory authority into all manner of

traditional, local activity without regard to the commercial nature or economic effects of those activities. State and local land-use agencies that have carefully reviewed the likely impacts of proposed landowner improvements to wetlands have become distressingly accustomed to seeing their considered decisions vetoed by federal agencies that admit no need to tie those vetos to commercial objectives. The Corps' interpretation of the Clean Water Act unwisely and unconstitutionally shuts the very state laboratories that have produced significant pioneering achievements in wetlands protection.

II. THE SIXTH CIRCUIT'S EXPANSIVE READING OF THE CLEAN WATER ACT CANNOT BE SQUARED WITH SWANCC.

This Court's holding in *SWANCC* is the beginning and end of this case: the text of the Clean Water Act does not remotely invite the Corps to invade traditional state prerogatives over land-use decisionmaking. Instead of recognizing the significant constitutional federalism concerns presented in, and clear statutory text governing, this case, however, the Sixth Circuit gave unlawful deference to the Corps' administrative interpretation and wrongly upheld the Corps' challenged regulations.

A. The Clean Water Act Does Not Prohibit The Employment Of Fill Materials For Purposes Of Improving Privately Owned Parcels Of Land.

In cases like this one where the federal government seeks to interfere in matters of local concern so as to "upset the usual constitutional balance of federal and state powers," it is "incumbent upon the federal courts to be certain of Congress'[s] intent." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). When Congress intends to intrude on "the usual constitutional balance of federal and state powers," it should clearly state its intention to do so. *Id.* at 460.

This venerable principle takes on added force when courts are asked to construe an *administrative interpretation* of the law. Courts should not “needlessly reach constitutional issues” nor presume that Congress “casually authorizes administrative agencies to interpret a statute to push the limit of congressional authority.” *SWANCC*, 531 U.S. at 172-73. Deference that might otherwise be due under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), is simply not applicable in cases where, as here, an agency interpretation raises grave constitutional concerns. *Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As this Court has emphasized, “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power,” there must be a “clear indication that Congress intended that result.” *SWANCC*, 531 U.S. at 172 (quoting *DeBartolo*, 485 U.S. at 575).

As noted above, land-use development and control has long been the province of state and local regulation. Indeed, “regulation of land use is perhaps the quintessential state activity.” *FERC v. Mississippi*, 456 U.S. at 767 n.30; *see also Lake Country Estates*, 440 U.S. at 402; *Hess*, 513 U.S. at 44; *Dolan*, 512 U.S. at 384; *Village of Euclid*, 272 U.S. at 365; *Warth*, 422 U.S. at 508 n.18. Accordingly, unless this Court determines that Congress *expressly* authorized the Corps’ intrusive, nationwide program of land-use controls, it is bound to invalidate the Corps’ challenged regulations.

The statutory provision invoked by the Corps in these cases, Clean Water Act section 404(a), authorizes the Corps to “issue permits ... for the discharge of *dredged* or *fill* material into the navigable waters at specified *disposal* sites.” 33 U.S.C. § 1344(a) (emphasis added). “Dredged” material refers to material that has been collected or brought up from the bottom of a river, *see* THE COMPACT OXFORD ENGLISH DICTIONARY 476 (1989), ordinarily for purposes of clearing channels for navigation. Dredged material is therefore

typically comprised of waste or refuse taken from lands lying beneath water. The reference to “dredged” waste materials, combined with the statute’s reference to “disposal sites” strongly suggests that Congress was concerned about waste materials being discarded in the Nation’s navigable waterways. *Cf. National Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399 (D.C. Cir. 1998) (emphasizing that the Act does not apply to the removal of material from the waters of the United States). This in turn suggests that the Clean Water Act, consistent with its overall pollution control objectives, was *not* intended to establish a regime of land-use controls. Rather the statute was primarily intended to modulate the “discharge” at “disposal sites” of “dredged” materials and similar wastes—that is, to prevent the lands submerged beneath navigable waters from becoming severely polluted dumping grounds.

Section 404(a)’s objective of controlling “disposals” of waste—as opposed to regulating improvements to private property in the manner of a zoning board—is further confirmed by the Act’s section 404(c). That close neighbor to section 404(a) states that the EPA Administrator “is authorized to prohibit the specification” of “any defined area” as “a disposal site,” *id.* § 1344(c)(2), so long as there appear to be good and sufficient ecological reasons for doing so. Under a plain reading of the statute, this provision is unexceptional: it means simply that the EPA may declare particularly sensitive lands off limits to waste-disposal activity. But under the Corps’ interpretation, the provision is truly extraordinary: it grants EPA the authority to identify parcels that will be deemed entirely off limits to development. Under the Corps’ view, EPA may refuse to specify any undeveloped wetland as “a disposal site” and thus effectively expropriate its entire economic value. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (local land-use regulation that prohibits all development and deprives parcel of all economic value

constitutes compensable Fifth Amendment Taking). Moreover, under the Corps' view, EPA can invoke this sweeping authority based on nothing more than "an unacceptable adverse effect" on things such as "wildlife" or "recreational areas." The Corps' section 404(c) reading crowns EPA's Administrator as the *uber*-arbiter of nationwide development and land-use decisionmaking.

The extreme implausibility of the Corps' statutory interpretation is further confirmed by its implications for even environmentally conscientious landowners. Consider, for example, a hypothetical landowner who cordons off a privately owned wetland; drains its water; and then fills the newly dry land with rock, sand, dirt, and gravel to prepare the ground for construction. Assuming that the drained waters were cleaned and filtered before being discharged off the property—thus preventing the discharge of any dredge or fill materials into any United States waters—there can be no claim that this hypothetical landowner has "discharged" anything but clean water itself into any "waters of the United States." There accordingly can be no claim that the landowner requires a section 404 permit under any reasonable reading of the Act. Nonetheless, the Corps' regulations would require this landowner to seek, and in many cases would require the Corps to deny, the issuance of such a permit.

It bears emphasis in this regard that Congress modeled the Clean Water Act's permitting requirements on the Rivers and Harbors Act of 1899 (also known as the "Refuse Act"). See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982) (noting that Congress "drew extensively ... upon the existing enforcement provisions of the Refuse Act of 1899"). Specifically, Congress sought to improve the pre-existing statutory scheme by filling the "significant gaps" that had rendered that Act "seriously inadequate." S. Rep. No. 92-414 (1971), reprinted in 1972, U.S.C.C.A.N. 3668, 3736; see also *id.* at 3672. Significantly, the Rivers and Harbors Act

